Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

D. HILL, K. BLACK, T. MEADORS, and J. BECKETT, *Petitioners*,

v.

MACARTHUR RUMBLES, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Prison Litigation Reform Act of 1995 amended 42 U.S.C. § 1997e to require inmates to exhaust "such administrative remedies as are available" before initiating an action under federal law.

1. Does the amendment require prisoners to exhaust internal prison grievance procedures before bringing a claim for damages?

2. Does the amendment require prisoners to exhaust administrative claim procedures before bringing a claim for damages?

LIST OF PARTIES

Petitioners are K. Black and J. Beckett, California correctional officers, T. Meadors, a correctional supervisor, and D. Hill, the warden of the California Correctional Institution. Respondent is Macarthur Rumbles, a prisoner confined at the California Correctional Institution.

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IN THE SUPREME COURT OF THE UNITED STATES

No.

D. HILL, K. BLACK, T. MEADORS, and J. BECKETT, *Petitioners*,

v.

MACARTHUR RUMBLES, *Respondent*.

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals is reported at 182 F.3d 1064 (9th Cir. 1999). Appendix 1a.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on June 30, 1999. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1) (1994).

STATUTES INVOLVED

This appeal concerns section 803(d) of the Prison Litigation Reform Act of 1995, Pub. L. No. 104-34, 110 Stat. 1321 (1996), which amended 42 U.S.C. § 1997e.

As amended, § 1997e provides in relevant part as follows:

> (a) Applicability of administrative remedies
>
> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a) (Supp. IV 1998).

Before it was amended, § 1997e provided in relevant part as follows:

> (a) Applicability of administrative remedies
>
> (1) Subject to the provisions of paragraph (2), in any action brought pursuant to section 1983 of this title by an adult convicted of a crime confined in any jail, prison, or other correctional facility, the court shall, if the court believes that such a requirement would be appropriate and in the interests of justice, continue such case for a period of not to exceed 180 days in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available.
>
> (2) The exhaustion of administrative remedies under paragraph (1) may not be required

> unless the Attorney General has certified or the court has determined that such administrative remedies are in substantial compliance with the minimum acceptable standards promulgated under subsection (b) of this section or are otherwise fair and effective.

42 U.S.C. § 1997e (1994).

STATEMENT OF THE CASE

Respondent Macarthur Rumbles is an inmate incarcerated at the California Correctional Institution (CCI). In his complaint, he alleged that correctional officer K. Black referred to him in derogatory terms and spit on him. Appendix 35a-37a. He further alleged that correctional officer J. Beckett made factual misrepresentations during an investigation, and that Black's supervisor, T. Meadors, condoned Black's behavior and was biased in conducting an ensuing disciplinary hearing involving respondent. *Id.* at 38a-39a. Lastly, respondent alleged that the warden of CCI, D. Hill, was responsible for illegal prison policies. *Id.* at 39a. Respondent's request for relief included a demand for an apology and $450,000 in punitive damages. *Id.* at 40a.

The prison officials filed a motion to dismiss in which they argued that respondent had failed to satisfy 42 U.S.C. § 1997e as amended by section 803(d) of the Prison Litigation Reform Act of 1995, Pub. L. No. 104-34, 110 Stat. 1321 (1996) (PLRA). In support of their motion, the prison officials presented evidence showing that respondent had failed to take advantage of an internal prison grievance procedure and an administrative process that provides monetary awards for claims against

the State and state employees. The district court treated the motion as one for summary judgment and denied it. *Id.* at 16a.

The prison officials sought and obtained permission to file an interlocutory appeal. After acknowledging that "[a]uthorities are split," the court of appeals concluded that amended § 1997e imposes no duty on state prisoners to exhaust internal grievance procedures before bringing federal damage claims. *Id.* at 10a. Disregarding the language and legislative circumstances of § 1997e, the court simply expressed an unwillingness to retreat from an earlier decision that had rejected a mandatory exhaustion requirement for federal prisoners bringing *Bivens* claims. *Id.* at 11a-12a (citing *Lunsford v. Jumao-As*, 155 F.3d 1178 (9th Cir. 1998)).

The court of appeals also concluded that the amended statute imposes no requirement on prisoners to exhaust state administrative claim procedures before suing for damages even if money awards could be procured in the administrative process. In support of its ruling, the court remarked, without analysis, that "[i]t does not appear that Congress intended such a change." Appendix 13a.

REASONS FOR GRANTING THE WRIT

This case presents the Court with the timely opportunity to resolve the clear and growing split among the circuits regarding the applicability of § 1997e's mandatory exhaustion requirement to prisoners' claims for damages. The Ninth Circuit's decision allowing inmates to bring claims for damages notwithstanding a failure to exhaust administrative remedies ignores the plain language and legislative evolution of § 1997e, and it impedes Congress's goals of reducing prisoner litigation, promoting

efficient case management, and minimizing court intrusion in prison affairs.

I.

THERE IS A PRONOUNCED CONFLICT AMONG THE CIRCUITS WHETHER § 1997e REQUIRES PRISONERS TO EXHAUST INTERNAL GRIEVANCE PROCEDURES BEFORE BRINGING A CLAIM FOR DAMAGES.

This petition should be granted to resolve the clear conflict among the circuits regarding the applicability of amended § 1997e's exhaustion requirement to prisoner suits that include a claim for damages under federal law. The Seventh and the Eleventh Circuits have held that the statute requires inmates to avail themselves of prison grievance procedures, regardless whether these programs confer monetary awards, before initiating an action for damages. *Perez v. Wisconsin Dep't of Corrections*, 182 F.3d 532, 537-38 (7th Cir. June 24, 1999); *Alexander v. Hawk*, 159 F.3d 1321, 1326 (11th Cir. 1998). In direct conflict with those circuits, the Ninth, Fifth, and Tenth Circuits have held that prisoners need not take advantage of internal grievance procedures before bringing a claim for damages if monetary awards could not be obtained in the administrative process. *Rumbles v. Hill*, Appendix 11a-12a; *Whitley v. Hunt*, 158 F.3d 882, 886-87 (5th Cir. 1998); *Garrett v. Hawk*, 127 F.3d 1263, 1266 (10th Cir. 1997).

Several courts of appeals, including the court below, have expressly commented upon the split, its irreconcilability, and the confusion it has caused in the district courts. *Rumbles v. Hill*, Appendix 10a ("Authorities are split."); *Perez v. Wisconsin Dep't of Corrections*, 182 F.3d at 537 ("[S]everal courts of appeals

have gone the other way."); *Alexander v. Hawk*, 159 F.3d at 1327 ("These [conflicting] decisions do not persuade us to accept [the prisoner's] position."); *Whitley v. Hunt*, 158 F.3d at 886 n.2 ("Among those federal district courts that have addressed the issue, there appears to be substantial disagreement."). The need to resolve the conflict is acute. This petition presents a timely and appropriate vehicle for the Court to provide needed guidance to the circuits and to settle the question.

II.

THE NINTH CIRCUIT'S DECISION IGNORES THE PLAIN LANGUAGE AND LEGISLATIVE EVOLUTION OF § 1997e.

As amended, § 1997e provides that "[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a) (Supp. IV 1998). The text is clear: if administrative procedures exist, an inmate must use them before bringing a federal lawsuit. There is nothing in the language to support the lower court's view that exhaustion is mandatory only when administrative programs dispense monetary awards or grant relief precisely congruent with the prisoner's desires.

If the text of the statute were not plain enough, its legislative evolution irrefutably establishes that Congress intended exhaustion to be mandatory regardless of the effectiveness of the available administrative process. Former § 1997e contained a discretionary exhaustion standard applicable when the administrative process was "plain, speedy, and effective." 42 U.S.C. § 1997e(a)(1) (1994). In amending the statute, Congress pointedly

deleted this requirement and confirmed that it expected exhaustion to be mandatory regardless whether the administrative process effectively dispenses relief to the prisoners' satisfaction. "[W]hen these words left the statute so did any warrant to inquire whether exhaustion would be availing." *Perez v. Wisconsin Dep't of Corrections*, 182 F.3d at 536. The Eleventh Circuit elaborated on this observation:

> The removal of the qualifiers "plain, speedy, and effective" from the PLRA's mandatory exhaustion requirement indicates that Congress no longer wanted courts to examine the effectiveness of administrative remedies but rather to focus solely on whether an administrative remedy program is "available" in the prison involved.

Alexander v. Hawk, 159 F.3d at 1326.

The importance of congressional intent in construing statutory exhaustion requirements was stressed by the Court in a case arising out of former § 1997e. In *McCarthy v. Madigan*, the Court examined the earlier version of the statute and concluded that it imposed no requirement on federal inmates to exhaust internal grievance procedures before seeking *Bivens* relief. 503 U.S. 140, 150-51 (1992). In reaching its conclusion, the Court provided straightforward instruction on how statutory exhaustion requirements are to be interpreted: "Of 'paramount importance' to any exhaustion inquiry is congressional intent." *Id.* at 144 (quoting *Patsy v. Board of Regents of Florida*, 457 U.S. 496, 501 (1982)). "[A]ppropriate deference to Congress' power to prescribe the basic procedural scheme under which a claim may be heard in a federal court requires fashioning of exhaustion

principles in a manner consistent with congressional intent and any applicable statutory scheme." *McCarthy v. Madigan*, 503 U.S. at 144. "Where Congress specifically mandates, exhaustion is required." *Id.* (citing *Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561, 579 (1989)).

Four years after *McCarthy* was announced, the PLRA was enacted. Unopposed statements made during congressional floor debates reveal that § 1997e was amended in direct response to the Court's holding in *McCarthy* and reflect a purpose to require prisoners to exhaust all available administrative procedures before initiating federal claims for damages:

> The real problem with these cases came with the Court's decision in 1992 that an inmate need not exhaust the administrative remedies available prior to proceeding with a *Bivens* action for money damages only. *McCarthy v. Madigan*, 112 S. Ct. 1081 (1992). This decision was made without the benefit of any legislative guidance and the Court made that point very clearly in its opinion, almost to the point of asking that Congress do something. . . . I am very pleased to say that I have worked with the conferees of H.R. 2076 to ensure that the prison litigation reform measures address the *Bivens* issue. The new administrative exhaustion language in H.R. 2076 will require that all cases brought by Federal inmates contesting any aspect of their incarceration be submitted to

> administrative remedy process before proceeding to court.

141 Cong. Rec. H14078-02, *H14105 (statement of Rep. Lobiondo). Because the PLRA was not passed as a committee bill, but rather was attached as a rider to an appropriations bill, "floor debate is more indicative of legislative intent than it otherwise would be, especially where the floor statements in favor of the bill remain uncontested as was the case with Congressman Lobiondo's remarks." *Garrett v. Hawk*, 127 F.3d at 1266 n.2; *see also Patsy v. Board of Regents of Florida*, 457 U.S. at 502-11 (relying heavily on floor debates in interpreting statutory exhaustion requirement).

In this case, the Ninth Circuit failed to examine the plain language and legislative evolution of § 1997e. With regard to the internal grievance procedures, the court simply declared that it was bound by principles of precedent to reject a mandatory exhaustion requirement because a similar conclusion had been reached in a case involving federal prisoners seeking *Bivens* relief. Appendix 11a-12a (citing *Lunsford v. Jumao-As*, 155 F.3d 1178 (9th Cir. 1998)). But the persuasive and precedential value of the one-paragraph decision in *Lunsford* was exaggerated; the case was decided on a stipulation between the parties, and the opinion never mentioned, let alone evaluated, the text or evolution of the statute. *Id.*

With regard to the lower court's conclusion that amended § 1997e imposes no obligation on prisoners to exhaust state administrative claim procedures, the court remarked that "[i]t does not appear that Congress intended such a change." Appendix 13a. This comment, however, was perfunctory and unsupported. In fact, legislative history supports a conclusion that Congress wanted inmates to exhaust administrative claim processes

in addition to prison grievance procedures. 141 Cong. Rec. H14078-02, *H14105 (statement of Rep. Lobiondo) (referring to the need to amend § 1997e to prevent inmates from circumventing "the congressionally created Federal Tort Claims Act" when filing *Bivens* actions).

The Ninth Circuit's decision "impose[s] an enormous loophole in the PLRA, which Congress clearly did not intend." *Alexander v. Hawk*, 159 F.3d at 1326. The text of amended § 1997e, its rejection of the earlier statute's requirement that the administrative remedy be effective, and other legislative circumstances confirm that Congress intended by its amendment to require the administrative exhaustion of all claims by prisoners before initiating federal litigation, regardless whether all aspects of the particular relief desired are procurable in the administrative process. The Ninth Circuit ignored congressional intent, and this petition should be granted to review and correct the lower court's error.

III.

THE QUESTIONS PRESENTED ARE IMPORTANT.

By equating "available" remedies with "effective" ones, the court of appeals wrongly presumed that only the inmates' interests are important in considering § 1997e's exhaustion requirement. Just because an administrative procedure cannot grant an inmate everything he might gain in federal litigation does not mean that the process is unavailable or fails to promote worthwhile social interests. This petition should be granted because the Ninth Circuit's decision undermines the important goals of reducing prisoner litigation, promoting efficient case management, and minimizing court intrusion in prison affairs.

First, if allowed to stand the decision will increase prisoner litigation. Under the Ninth Circuit's construction of amended § 1997e, prisoners must simply assert a claim for damages, or seek some other type of relief that cannot be bestowed in the administrative process, to avoid exhaustion requirements. This interpretation will encourage inmates to file such claims -- a result directly contrary to congressional intent. Among other reasons, the PLRA was enacted to "curtail the ability of prisoners to bring frivolous and malicious lawsuits by forcing prisoners to exhaust all administrative remedies before bringing suit in Federal court." 141 Cong. Rec. H14078-02, *H14106 (statement of Rep. Canady).

Reducing prisoner litigation is a worthwhile goal that should not have been casually overlooked by the court below. Prisoner cases constitute a large percentage of the federal docket. By 1995 more than twenty-five percent of the suits filed in federal district court were brought by prisoners. *Roller v. Gunn*, 107 F.3d 227, 230 (4th Cir. 1997) (citing Administrative Office of the United States Courts, 1995 Federal Court Management Statistics 167). In enacting the PLRA, senators emphasized that the number of prisoner lawsuits "has grown astronomically -- from 6,600 in 1975 to more than 39,000 in 1994." 141 Cong. Rec. S14408-01, *S14413 (statement of Sen. Dole for himself and eleven other senators). The consequence of the lower court's decision will directly clash with Congress's desire to reduce the number of prisoner lawsuits.

Not only will the Ninth Circuit's decision encourage prisoners to bring more claims, judicial management of their cases will become increasingly cumbersome and complex. District courts will be forced to parse out inmate allegations to ascertain the exact relief sought and whether administrative remedies could have

provided an equivalent remedy. Contrary to the goal of uniform application of federal law, different rules of federal exhaustion will develop for every federal, state, and local penal system based on the peculiarities of their administrative processes. And when inmates who have failed to exhaust administrative remedies initiate actions seeking both damages and equitable remedies, their cases will become fragmented since, under the lower court's approach, exhaustion is required for only certain types of injunctions.

Prisoners' allegations cannot be classified as equitable or legal as neatly as the Ninth Circuit imagines. In this case, the court of appeals described respondent's allegations against officer Black as seeking only damages and concluded that administrative remedies were unavailable because money could not be awarded in CCI's internal grievance process. Appendix 6a-7a. But, in doing so, the court overlooked the fact that respondent also sued another correctional officer for making misrepresentations during an investigation, his supervisor for providing inadequate supervision and being biased in a disciplinary hearing, and the warden of CCI for promoting illegal policies. Appendix 38a-40a. If respondent had filed a prison grievance, his supervisory and policy charges could have been examined and corrective measures might have been initiated. "When an agency has the opportunity to correct its own errors, a judicial controversy may well be mooted, or at least piecemeal appeals may be avoided." *McCarthy v. Madigan,* 503 U.S. at 145. "And even where a controversy survives administrative review, exhaustion of the administrative procedure may produce a useful record for subsequent judicial consideration . . . ." *Id.* The Ninth Circuit ignored these pragmatic considerations.

Finally, the Ninth Circuit's decision undermines Congress's goal of minimizing judicial intrusion in prison affairs. *See, e.g.*, 142 Cong. Rec. S3703-01, *S3704 (statement of Sen. Abraham) ("Our proposals will return sanity and State control to our prison systems."); 141 Cong. Rec. S144611-01, *S14626 (statement of Sen. Dole) ("These guidelines will work to restrain liberal Federal judges . . . who have used these complaints to micromanage State and local prison systems."); *Id.* at *S14627 (statement of Sen. Hatch) ("[I]t is time to wrest control of our prisons from the lawyers and the inmates and return that control to competent administrators . . . ."); 141 Cong. Rec. H1472-06, *H1480 (statement of Rep. Canady) ("The bill also provides much needed relief for States dealing with the problem of frivolous litigation by prisoners and unreasonable Federal court intervention in the operation of jails and correctional facilities.").

Requiring exhaustion gives prison officials the first opportunity to address inmate grievances, correct possible wrongdoing, and mitigate damages. Providing prison administrators with the ability to resolve problems early and outside the context of litigation advances Congress's interests in curbing frivolous lawsuits, promoting efficient case management, and discouraging judicial intervention in prison affairs. The Ninth Circuit's holding undermines these interests. Accordingly, the Court should grant this petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: September 23, 1999.

Respectfully submitted,

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APPENDIX

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MACARTHUR RUMBLES, **Plaintiff-Appellee,** **v.** **DONALD R. HILL, BLACK AND BECKETT,** **Defendants-Appellants.**	**No. 98-16794** **D.C. No. CV-97-05553-AWI** **OPINION**

Appeal from the United States District Court
for the Eastern District of California
Anthony W. Ishii, District Judge, Presiding

Argued and Submitted
April 12, 1999--San Francisco, California

Filed June 30, 1999

Before: Robert R. Beezer and Stephen S. Trott,
Circuit Judges, and Samuel P. King,* District Judge.

Opinion by Judge King

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*Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

SUMMARY

Individual Rights/Civil Rights

The court of appeals affirmed an order of the district court. The court held that under the Prison Litigation Reform Act (PLRA), a prisoner's failure to exhaust administrative remedies does not deprive a federal court of subject-matter jurisdiction over a claim under 42 U.S.C. § 1983, when the inmate seeks only money damages that are not available through the prison's grievance process.

As amended by the PLRA, 42 U.S.C. § 1997e(a) provides that a prisoner may not bring an action with respect to prison conditions under § 1983 or other federal law unless available administrative remedies are exhausted.

A California prisoner, appellee MacArthur Rumbles filed a pro se § 1983 action alleging various wrongs he suffered at the hands of a prison guard. He sought injunctive relief and money damages.

The district court determined that it lacked power to grant the injunctive relief Rumbles sought, but addressed the action as one for money damages only. The court held that because California's administrative prison grievance process does not allow for money damages, that form of relief was not an "available" remedy that had to be exhausted before a prisoner can bring a § 1983 action. The court also ruled that exhaustion was not required under the California Tort Claims Act (CTCA).

On appeal, appellant Donald Hill and other State prison officials contended that § 1997e(a)'s exhaustion requirement is jurisdictional, and that a prisoner seeking monetary relief must exhaust administrative remedies even when they do not afford monetary relief. Hill also argued that in addition to prison grievance procedures, Rumbles had a remedy "available" under the CTCA that he was required to exhaust.

[1] A statute requiring exhaustion of administrative remedies may be jurisdictional if it is more that a codified requirement of administrative exhaustion, and contains sweeping and direct language that goes beyond a requirement that only exhausted actions be brought. [2] Section 1997e(a) contains no such sweeping and direct language. It simply codifies the administrative exhaustion doctrine that governs the *timing* of federal-court decisionmaking.

[3] Under companion provisions of the PLRA, district courts are required to screen prisoners' complaints and dismiss those that are frivolous, malicious, fail to state a claim, or seek monetary relief from a defendant who is immune from such relief. The statute permits district courts to dismiss such claims on the merits even when administrative remedies have not been exhausted. The court would not be empowered to do so if the exhaustion provision deprived the court of jurisdiction over the action. Section 1997e(a) is not jurisdictional.

[4] Exhaustion of administrative remedies under § 1997e(a) is not required if a prisoner's § 1983 claim seeks only money damages and the correctional facility's administrative process does not allow for such an award.

[5] The PLRA did not overrule the well-established principle that exhaustion of state tort remedies is not required before bringing a § 1983 action. [6] The language

of the PLRA and the pre-PLRA version of § 1997e indicate that Congress had internal prison grievance procedures in mind when it passed the PLRA. [7] Decisions from every district court in California have concluded that the CTCA procedure is not an administrative remedy that a prisoner must exhaust under § 1997e(a). Legislative history also suggests that "administrative remedies" refers exclusively to prison grievance procedures.

[8] The CTCA procedures - including the requirement that a state tort claim first be presented to the State Board of Control - are not "available administrative remedies" that a prisoner must exhaust for purposes of § 1997e(a).

COUNSEL

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OPINION

KING, District Judge:

INTRODUCTION

Donald R. Hill, K. Black, and J. Beckett (collectively, "Hill") appeal interlocutorily an order

denying their motion to dismiss MacArthur Rumbles' prisoner 42 U.S.C. § 1983 action for failure to exhaust administrative remedies as required by 42 U.S.C. § 1997e(a). We have jurisdiction pursuant to 28 U.S.C. § 1292, and we affirm. We hold that the failure to exhaust administrative remedies under section 1997e(a) does not deprive a federal court of subject matter jurisdiction where money damages is the sole relief sought and where such a remedy is not available through the prison's administrative grievance process.

DISCUSSION

This appeal concerns section 803(d) of the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (1996) ("PLRA") (amending 42 U.S.C. § 1997e(a). As amended by the PLRA, section 1997e(a) provides:

> (a) Applicability of administrative remedies
>
> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a) (Supp. IV 1998).

Prior to the PLRA, section 1997e contained a comparatively lenient exhaustion requirement for prisoner cases that directed courts to "continue . . . [a prisoner section 1983] case for . . . [up to] 180 days in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available" if the court "believes that such a requirement would be appropriate and in the interests of justice." 42 U.S.C. § 1997e(a)(1)

(1994); *see Patsy v. Board of Regents,* 457 U.S. 496, 511 (1981). The pre-PLRA version of the statute also required the Attorney General to certify that those administrative remedies were "in substantial compliance with the minimum acceptable standards promulgated under subsection (b)"[1] or were "otherwise fair and effective." 42 U.S.C. § 1997e(a)(2) (1994); *see Patsy,* 457 U.S. at 510-11. The PLRA, however, deleted the statutory phrase "plain, speedy, and effective" and eliminated the requirement that administrative remedies meet "minimum acceptable standards" or otherwise be "fair and effective." The amended version of section 1997e now simply requires the exhaustion of "such administrative remedies as are available." In contrast to the pre-PLRA version of section 1997e, this new exhaustion requirement is mandatory. *See Garrett v. Hawk,* 127 F.3d 1263, 1265 (10th Cir. 1997) ("Congress amended § 1997e to make the exhaustion provision mandatory rather than discretionary").

Rumbles' pro se complaint alleged, among other things, that a prison guard spit on him, called him racial epithets, and assaulted or threatened to assault him. He sought injunctive type relief (an apology from Hill and a federal investigation into "new California laws that are stiffer on repeat offenders and [the] effect [of such laws] on the conduct of Correctional Officers"), as well as

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[1]Subsection (b) directed the Attorney General, following consultation with experts in the field, to promulgate "minimum standards for the development and implementation of a plain, speedy, and effective system for the resolution of grievances of adults confined in any jail, prison, or other correctional facility . . . ." 42 U.S.C. § 1997e(b)(1) (1994).

monetary damages for excessive force.[2] The district court held that it had no power to conduct its own investigation into "how state laws might be affecting correctional officers" and that it could not compel a party to apologize. Because the only cognizable remedy was claim for damages, the district court properly analyzed the action as one seeking only damages.[3]

The district court held that because California's administrative prison grievance process does not allow for monetary damages, this form of relief does not constitute an "available" remedy that must be exhausted before bringing a section 1983 action. The district court also held that exhaustion of state administrative procedures under the California Tort Claims Act is not required before filing a section 1983 action.

The primary questions on appeal are whether exhaustion of administrative remedies is a jurisdictional requirement under 42 U.S.C. § 1997e and whether exhaustion is mandatory even where the process would be futile. What does "available" mean as that term is used in section 1997e(a)? These are all questions of law reviewed de novo. *See Tierney v. Kupers,* 128 F.3d 1310, 1311 (9th Cir. 1997) (interpretation of statute is a question of law reviewed de novo).

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[2]Rumbles argues on appeal that his excessive force claim is not "with respect to prison conditions." In doing so, Rumbles is arguing that he need not exhaust administrative remedies because this claim is not governed by section 1997e(a). We decline to address this issue because it was not raised below. *See United States v. Flores-Payon,* 942 F.2nd 556, 558 (9th Cir. 1991) ("Issues not presented to the trial court cannot generally be raised for the first time on appeal.").

[3]Rumbles makes it clear in his brief on appeal that he has waived any claim for injunctive-type relief.

A.

Initially, Hill argues that section 1997e(a)'s exhaustion requirement is jurisdictional. That is, Hill claims that a district court may never reach the merits of a prisoner's section 1983 claim unless all available administrative remedies have been exhausted. We disagree.

The Supreme Court case that provides guidance for determining whether a statutory exhaustion requirement is jurisdictional is *Weinberger v. Salfi,* 422 U.S. 749, 757 (1975). In *Weinberger,* the Court considered language from the Social Security Act that read: "No action against the United States, the Secretary, or any officer or employee thereof shall be brought under [section 1331 et seq.] of Title 28 to recover on any claim arising under [Title II of the Social Security Act]." *Id.* at 756 (quoting 42 U.S.C. § 405(h) (1970) (alterations in original). The Court rejected the interpretation that this was a non-jurisdictional provision that "amounted to no more than a codification of the doctrine of exhaustion of administrative remedies." *Id.* at 757.

[1] Instead, the Court held that "this provision bars district court federal-question jurisdiction over suits . . . . That the third sentence of § 405(h) is more than a codified requirement of administrative exhaustion is plain from its own language, which is sweeping and direct and which states that no action shall be brought under § 1331, not merely that only those actions shall be brought in which administrative remedies have been exhausted." *Id.* Thus, a "statute requiring exhaustion of administrative remedies may be jurisdictional if it is 'more than a codified requirement of administrative exhaustion' and contains 'sweeping and direct' statutory language that goes beyond a requirement that only exhausted actions be brought." *Underwood v. Wilson,* 151 F.3d 292, 294 (5th Cir.

1998) (quoting Weinberger, 422 U.S. at 757), *cert. denied*, 119 S. Ct. 1809 (1999).

[2] As the Fifth Circuit observed in Underwood, "§ 1997e(a) contains no such sweeping and direct language barring federal question jurisdiction under 28 U.S.C. § 1331." *Id.* Section 1997(e)(a) "merely provides that '[n]o action shall be brought ... until such administrative remedies as are available are exhausted.' This is a precisely the type of language held in *Weinberger v. Salfi* not to limit federal jurisdiction." *Id.* We agree with the Fifth Circuit and hold that section 1997e(a) simply codifies the administrative exhaustion doctrine that is "one among related doctrines - including abstention, finality, and ripeness - that govern the timing of federal-court decisionmaking." *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992) (emphasis added). The balance of existing authority supports this view. *See Wright v. Morris*, 111 F.3d 414, 421 (6th Cir.) ("Section 1997e(a), in contrast, contains neither the sweeping and direct language of [the statute at issue in *Weinberger*] nor the statute's explicit bar to district court jurisdiction.) *cert. denied*, 118 S. Ct. 263 (1997); Lacey v. C.S.P. Solano Medical Staff, 990 F. Supp. 1199, 1203 (E.D. Cal. 1997) (section 1997e(a) does not limit federal court jurisdiction). *But see Morgan v. Arizona Dept. of Corrections*, 976 F. Supp. 892, 895 (D. Ariz. 1997) (section 1997e(a) exhaustion requirement is jurisdictional).

[3] This conclusion is further compelled by 42 U.S.C. §§ 1997e(c)(1) & (2), companion provisions of the PLRA. Under those provisions, district courts are required to screen prisoners' complaints and to dismiss those that are "frivolous, malicious, fail[] to state a claim ..., or seek[] monetary relief from a defendant who is immune from such relief." 42 U.S.C. § 1997e(c)(2). The statute specifically permits district courts to dismiss such claims on the merits even where administrative remedies have not been exhausted. *See id.* "The court would not be

empowered to do so if the exhaustion provision deprived the court of jurisdiction over the action." *Underwood*, 151 F.3d at 295; *see Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379 (1981) (a court has no power to reach the merits of a claim if it lacks jurisdiction); *see generally In re Burns*, 974 F.2d 1064, 1066 (9th Cir. 1992) (a court should avoid a statutory interpretation that "fails to give effect to every subsection" of a law). In short, section 1997e(a) is not jurisdictional.

B.

Even if exhaustion is not jurisdictional under the PLRA, Hill argues that a prisoner seeking monetary relief must nevertheless exhaust administrative remedies even where monetary relief is not available within the prison grievance system. Because the California Department of Corrections ("CDC") grievance procedures do not allow for monetary damage awards,[4] *see Lacey*, 990 F. Supp. At 1205 ("[CDC] grievance process does not provide for monetary relief"), the question is whether those procedures are an "available remedy" where a prisoner seeks only monetary damages.

Authorities are split. *See Beeson v. Fishkill Correctional Facility*, 28 F. Supp. 2d 884, 888 (S.D.N.Y. 1998) (federal courts "have differed ...about whether to apply § 1997e(a) where plaintiffs seek money damages and such relief is not 'available' through the administrative process") (collecting cases). *Compare, e.g., Garrett v. Hawk*, 127 F.3d 1263, 1266 (10th Cir. 1997) (§ 1997e(a)'s exhaustion requirement applies only to the extent that the administrative process could provide the relief sought) and

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[4]Although the CDC grievance procedures authorize up to $100 of compensation for property damage, see Cal. Code Reg. Tit. 15 §§ 3084.1 3084.7, Rumbles does not seek relief for property damage.

Whitley v. Hunt, 158 F.3d 882, 886-87 (5th Cir. 1998) (same) with *Alexander v. Hawk*, 159 F.3d 1321, 1326 (1th Cir. 1998) (exhaustion mandatory even where the administrative process does not provide the requested relief; "available remedy" does not mean "adequate remedy"). Ultimately, however, the case on appeal is governed by our decision in *Lunsford v. Jumao-As*, 155 F.3d 1178 (9th Cir. 1998).

In *Lunsford*, we were reviewing the claim of a federal prisoner "seek[ing] only damages in his [*Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971)] action for claims arising from past conduct by prison officials ...." 155 F.3d at 1179. We held that Lunsford was ... not required to exhaust his administrative remedies before filing this lawsuit in the district court in light of the fact that the [Bureau of Prison's] Administrative Remedy Program only provides for injunctive relief." *Id.* The holding in *Lunsford* amounts to a rules that federal prisoners pressing *Bivens* claims need not pursue prison remedies when they are seeking exclusively monetary relief, and there are no prison remedies capable of affording such relief. In this regard, *Lunsford* is consistent with pre-PLRA law. *See McCarthy*, 503 U.S. at 149 (prisoner need not exhaust administrative remedies before pursuing *Bivens* claim for damages); *Cooney v. Edwards*, 971 F.2d 345, 346 (9th Cir. 1992) (same).

[4] The district court in the instant case simply extended *Lunsford*'s reasoning from a *Bivens* action to Rumbles' section 1983 action, and held that Rumbles need not exhaust the CDC grievance process because it does not provide for monetary relief. Extending *Lunsford* from a *Bivens* action to a section 1983 action is logical. "Actions under § 1983 and those under Bivens are identical save for the replacement of a state actor under § 1983 by a federal actor under Bivens." *Van Strum v. Lawn*, 940 F.2d 406, 409 (9th Cir. 1991). More

importantly, in the PLRA Congress included prisoner *Bivens* actions within the statutory reach of section 1997e(a). *See Garrett*, 127 F.3d at 1265 ("Because § 1997e pertains to 'any action brought ...under ... any [] Federal law, by a prisoner confined in any jail, prison or other correctional facility,' the exhaustion requirements now apply to *Bivens* suits brought by federal prisoners against federal officials as well.") (emphasis and alterations in original); *Alexander*, 159 F.3d at 1325 ("Congress intended the PLRA section 1997e(a) to apply to both state and federal prisoners.") Accordingly, we extend *Lunsford* to section 1983 actions. Exhaustion of administrative remedies under section 1997e(a) is not required if a prisoner's section 1983 claim seeks only money damages and if the correctional facility's administrative grievance process does not allow for such an award.

C.

[5] Hill argues that, in addition to prison grievance procedures, Rumbles had "available" an administrative remedy under the California Tort Claims Act ("CTCA") that he was required to exhaust before bringing his section 1983 suit. In particular, Hill contends that Rumbles could have filed a claim with the California State Board of Control, the agency empowered to review and pay claims against all state agencies, including the CDC. To adopt this argument, however, we must find that the PLRA overrules the well-established principle that exhaustion of state tort remedies is not required before bringing a section 1983 action. *See, e.g., Heck v. Humphrey*, 512 U.S. 477, 480 (1994) ("In general, exhaustion of state remedies is not a prerequisite to an action under quotation marks and alterations omitted); *Felder v. Casey*, 487 U.S. 131, 140-41 (1988) (state notice-of-claim statutes are inapplicable to section 1983 suits); *Patsy*, 457 U.S. at 516 ("exhaustion of state remedies should not be required as a prerequisite to bringing an action pursuant to § 1983").

[6] It does not appear that Congress intended such a change. The language of the PLRA, as will the language of the pre-PLRA version of section 1997e, indicates that Congress had internal prison grievance procedures in mind when it passed the PLRA. That is, while Congress certainly intended to require prisoners to exhaust available prison administrative grievance procedures, there is no indication that it intended prisoners also to exhaust state tort claim procedures. For example, section 1997e(b) tellingly provides that "the failure of a State to adopt or adhere to an administrative grievance procedure shall not constitute the basis for an action" (emphasis added). "It thus appears that throughout § 1997e Congress is referring to institutional grievance processes and not state tort claims procedures." *Lacey*, 990 F. Supp. at 1206.

> [T]he only federal courts considering the issue [whether state notice-of-claim procedures are an "administrative remedy"] post-PLRA conclude that the legislative history which is both pre- and post-PLRA) "seems to indicate that the drafters did not intend to require prisoners to exhaust state tort remedies before filing a federal civil rights claim. It implies that Congress merely intended to require exhaustion of prison grievance procedures."

Blas v. Endicott, 31 F. Supp. 2d 1131, 1132 (E.D. Wisc. 1999) (quoting *Barry v. Ratelle*, 985 F. Supp. 1235, 1238 (S.D. Cal. 1997); *cf. Jenkins v. Morton*, 148 F.3d 257, 259 (3rd Cir. 1998) (under revised section 1997e)(a) a prisoner need not exhaust state judicial remedies before filing a section 1983 action).

[7] Moreover, in analyzing the specific California notice-of-claim procedure at issue here, decisions from every district court in California have concluded that the CTCA procedure is not administrative remedy that a

prisoner must exhaust under section 1997e(a). *See, e.g., Lacey*, 990 F. Supp. at 1206-08; *Barry*, 985 F. Supp. At 1238; *Plasencia v. California*, 29 F. Supp. 2d 1145, 1148-49 (C.D.Cal. 1998); *Palomino v. Stanton*, No. C 96-2984 FMS, 1998 WL 196461, *2 (N.D. Cal. April 21, 1998); *King v. Steinberg*, No. C 97-3090 CRB, 1998 WL 473899, *2 (N.D. Cal. July 31, 1998). Legislative history also suggests that the summary phrase "administrative remedies" refers exclusively to prison grievance procedures. Senator Kyl, one of the co-sponsors of the PLRA, testifies:

> Mr. President, I join Senator Dole in introducing the Prison Litigation Reform Act of 1995. This bill will deter frivolous inmate lawsuits.... Section 7 will make the exhaustion of administrative remedies mandatory. Many prisoner cases seek relief for matters that are relatively minor and for which the prison grievance system would provide an adequate remedy.

141 Cong. Rec. S7526-7527 (May 25, 1995) (emphasis added).

In contrast, Congress gave no indication that it intended to overrule the settled understanding that the phrase "administrative remedies" in section 1997e does not include state notice-of-claim procedures. *See Lacey*, 990 F. Supp. at 1206; *cf. Felder*, 487 U.S. at 140-41 (state notice-of-claim statutes are inapplicable to section 1983 suits). "This absence of congressional intent is particularly significant given that federal courts have traditionally held that such requirements, including those contained in the California Tort Claims Act, are inapplicable in federal civil rights actions." *Lacey*, 990 F. Supp. At 1206-07 (collecting cases).

[8] Accordingly, we hold that California Tort Claims Act procedures -- including the requirement that a state

tort claim first be presented to the California State Board of Control -- are not "available administrative remedies" that a prisoner must exhaust for purposes of section 1997e(a).

CONCLUSION

The district court's order denying Hill's motion to dismiss is affirmed.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR

THE EASTERN DISTRICT OF CALIFORNIA

MACARTHUR RUMBLES, **Plaintiff,** **v.** **D.R. HILL, et al.,** **Defendants.**	**CV F 97-5553 AWI SMS P** **MEMORANDUM OPINION AND ORDER RE: FINDINGS AND RECOMMENDATIONS FILED APRIL 30, 1998 ADDRESSING DEFENDANTS' MOTION TO DISMISS [Doc. 19]**

Pending before the court are the Magistrate Judge's Findings and Recommendations filed April 30, 1998. After consideration of the Findings and Recommendations, the entire court file, the applicable statutes, and relevant caselaw, the court will deny defendants' motion to dismiss for the modified reasons set forth below.

PROCEDURAL HISTORY & FACTUAL ALLEGATIONS

On December 9, 1996 Rumbles' Complaint was received by the Clerk of the United States District Court, Central District of California, and it was lodged the following day. On April 29, 1997 Rumbles' Complaint was filed in the Central District.

In his complaint Rumbles alleges that K. Black spit on him, referred to him with coarse racial and sexual epithets, threatened him with violence, handcuffed him

and took him to an office where she told him she would see that he was place him in a heightened security portion of the California Correctional Institution at Tehachapi. Rumbles further alleges that Black took such actions with the permission of her supervisor Lt. T. Meadors, who is alleged to have told Rumbles that Black could do anything she wanted to get her job done. Rumbles also claims that he was found guilty of unspecified charges at a disciplinary hearing related to Blacks conduct, and that J. Beckett did not conduct a fair investigation into the charges. Rumbles further asserts that the above conduct was taken pursuant to a policy of the warden, D. R. Hill.

On May 1, 1997 this action was transferred to the Eastern District.

On July 24, 1997 the Magistrate Judge granted Rumbles in forma pauperis status, and determined that Rumbles stated a cognizable claim against D. R. Hill, T. Meadors, K. Black, and J. Beckett.[1]

On November 14, 1997 the three served defendants filed the pending motion to dismiss for lack of subject matter jurisdiction on the basis that Rumbles had not exhausted his claims prior to filing this action. Rumbles did not file an opposition.

On April 30, 1998 the Magistrate Judge issued the pending Findings and Recommendations, to which defendants filed timely Objections on May 29, 1998.

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[1]All defendants have been served except for Meadors. As of the date of this Memorandum Opinion and Order the U.S. Marshal has been unable to locate Meadors.

LEGAL STANDARDS

When timely objections to findings by a magistrate judge are filed, this court must conduct a de novo determination of the findings. 28 U.S.C. §636(b)(1). Regardless of whether objections to findings are filed, this court must conduct a de novo review of a magistrate judge's recommendations as to issues of law. See Britt v. Simi Valley Unified School Dist., 708 F.2d 452, 454 (9th Cir. 1983).

Given the nature of defendants' motion the Findings and Recommendations presently before the court do not include proposed factual findings, but solely contain conclusions of law relating to the statutory interpretation of 42 U.S.C. § 1997e(a). As such the court must conduct a de novo review of the entire Findings and Recommendations.

For the reasons set forth below, the court will analyze defendants' motion to dismiss pursuant to Fed.R.Civ.P. 56. If the moving party offers "matters outside the pleading" in support of the motion, Rule 12(b) provides that the motion be analyzed pursuant to the standards of Rule 56.

Summary judgment shall be granted where there exists no genuine issue as to any material fact, and the undisputed facts entitle the moving party to judgment as a matter of law. Fed.R.Civ.P. 56(c). The moving party bears the initial duty to inform the district court of the bases for its motion, and to identify the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any" which demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

Where the opposing party does not file an opposition to the motion, that failure cannot be deemed to be

consent to the granting of the motion. Evans v. Independent Order of Foresters, __ F.3d __, 1998 WL 154583 (9th Cir. 1998). Instead the district court must determine whether the moving papers and evidence are sufficient to establish the lack of any triable issue of fact, and that the movant is entitled to judgment. Id.

DISCUSSION

Defendants raise two separate contentions regarding exhaustion. First defendants claims that Rumbles cannot prove his allegation that he filed two administrative appeals within the institution. Second defendants contend that Rumbles has not presented his damages claim to the state Board of Control.

I. Defendants' Motion To Dismiss For Lack of Subject Matter Jurisdiction Will Be Construed As A Motion For Summary Judgment

Defendants have noticed their motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1), contending that if a prisoner has not exhausted available administrative remedies as required by 42 U.S.C. § 1997e(a), that failure deprives a court of subject matter jurisdiction over the action.

As will be explained, the court finds that the failure to prove exhaustion of administrative remedies required by section 1997e(a) is not a jurisdictional bar, but is a failure to state a valid claim for relief. Defendants' motion to dismiss for lack of subject matter jurisdiction, because it relies on extrinsic evidence to show that Rumbles cannot prove that he exhausted his claims, must be analyzed under Fed. R. Civ. P. 56.

Prior to April 26, 1996 prisoners were not, as a rule, required to exhaust administrative remedies before filing

a federal civil rights action. The former section 1997e(a)(1) provided that a district court "shall, if the court believes that [exhaustion of administrative remedies] would be appropriate and in the interests of justice," continue the action for 180 days or less "in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available." The former section 1997e(a)(2) stated that such exhaustion "may not be required unless [either] the Attorney General has certified or the court has determined that [the] administrative remedies" met certain specified standards set forth in another sub-section of the former section 1997e. Under the former law a district court lacked authority to dismiss an action by a state prisoner for failure to exhaust administrative remedies. At most the court could stay the action for up to 180 days if it found that exhaustion was required in the interests of justice and that the state's prison grievance procedure set certain minimum standards. Francis v. Marquez, 741 F.2d 1127 (9th Cir. 1984).

In 1996 Congress enacted the PLRA, the date of enactment being April 26, 1996, Tierney v. Kupers, 128 F.3d 1310, 1311 (9th Cir. 1997), thus applicable to this action originally filed after that date. As part of the PLRA Congress amended section 1997e(a) to require that a prisoner first exhaust all available administrative remedies before the prisoner could bring an action under federal law challenging the conditions of confinement. Because the new language of 1997e(a) regarding exhaustion is expressly mandatory in nature, defendants contend that this court lacks subject matter jurisdiction over this action if Rumbles cannot prove that he exhausted his claims.

The Ninth Circuit has not considered whether the failure of a prisoner to plead exhaustion of administrative remedies deprives a district court of subject matter

jurisdiction over the action. No other Circuit has expressly found that the statute is jurisdictional as to claims filed after the date of the enactment of the PLRA.[2] District courts within the Ninth Circuit have split on this issue. Lacey v. C.S.P. Solano Med. Staff, 990 F. Supp. 1199, 1203 (E.D. Cal. 1997) (exhaustion requirement in section 1997e(a) is not jurisdictional); Palomino v. Stanton, 1997 WL 350099 (N.D. Cal. 1997) (same); contra Morgan v. Arizona Dep't of Corrections, 976 F. Supp. 892 (D. Az. 1997) (exhaustion requirement in section 1997e(a) is jurisdictional); Hernandez v. Browman, 1997 WL 383155 (N.D. Cal. 1997) (same).

A district court should avoid a statutory construction that "fails to give effect to every subsection" of a law. In re Burns, 974 F. 2d 1064, 1066 (9th Cir. 1992).

If section 1997e(a) stood alone, it would be reasonable to interpret the statute's language, "no action shall be brought" until all "available" administrative remedies are "exhausted," to mean that a federal court should not decide the merits of a claim, or otherwise adjudicate the claim, until after exhaustion of administrative remedies. Jervis v. United States, 966 F. 2d 517, 518-19 (9th Cir. 1992) (interpreting statutory language that "an action shall not be instituted upon a [certain type of] claim ... unless the claimant shall have first presented the claim to the appropriate Federal agency" to be jurisdictional). However, interpreting section 1997e(a) in such a manner would not be proper because it would fail

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[2]The Sixth Circuit held that a district court has jurisdiction to hear the claim of a prisoner who filed a federal civil rights action before the date of the enactment of PLRA, but did not plead exhaustion of administrative remedies. Wright v. Morris, 111 F.3d 414, 420-21. The Sixth Circuit expressly declined to decide whether "district courts can exercise jurisdiction over unexhausted prisoners" claims filed after the PLRA's enactment." Id. at n. 10.

to give any effect at all to another portion of the PLRA, specifically section 1997 e(c)(2).

Congress, at the same time it amended section 1997e(a), also amended section 1997e(c). That section now explicitly grants a district court the power to dismiss certain prisoner claims on the merits even where a prisoner has not pleaded exhaustion of administrative remedies. In order for a district court for follow the congressional mandate of section 1997e(c)(2) and dismiss prisoner claims that are frivolous, malicious, or fail to state a claim, the court must consider the merits of the claim as pleaded. It is elementary that a district court has no power to consider the merits of a claim if it lacks subject matter jurisdiction over the action. Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 379-80 (1981).

Further, if defendants were correct that this court lacked subject matter jurisdiction over prisoner claims that have not been exhausted, and this court were to dismiss such a claim due to frivolousness pursuant to section 1997e(c)(2), the order of dismissal and resulting judgment would be void and of no legal effect. Watts v. Pinckney, 752 F. 2d 406, 409 (9th Cir. 1985) (judgment is void if court granting judgment lacked subject matter jurisdiction over the action).

Acceptance of defendants' proposed interpretation of section 1997e(a) as jurisdictional would also mean that at any time in the future a prisoner could rightfully move under Fed. R. Civ. P. 60(b)(4) to vacate a dismissal granted pursuant to section 1997e(c)(2) simply because the prisoner had not exhausted his claim. Wages v. Internal Revenue Service, 915 F. 2d 1230, 1234 (9th Cir. 1990), cert. denied, 498 U.S. 1096 (1991).

Additionally, under defendants' proposed interpretation a judgment entered pursuant to section

1997e(c)(2) in an action where the prisoner had not exhausted his claims would have no res judicata effect in future actions. Ethridge v. Harbor House Restaurant, 861 F.2d 1389, 1390-91 (9th Cir. 1988).

The results that would necessarily follow from defendants' proposed interpretation are patently at odds with congressional intent to lessen the burden on the courts and on society resulting from the filing and prosecution of frivolous federal claims by prisoners, mostly in forma pauperis. See Hadix v. Johnson, - F.3d -, 1998 WL 177343 at *4 (6th Cir. 1998); Roller v. Gunn, 107 F.3d 227, 230-31 (4th Cir. 1997).

The court finds that section 1997e(a) is a codification of the exhaustion doctrine as to federal claims brought by prisoners challenging the conditions of confinement. As such the requirement addresses the timing of the bringing of such actions. McCarthy v. Madigan, 503 U.S. 140, 144 (1992) ("[t]he doctrine of exhaustion of administrative remedies is one among related doctrines-including abstention, finality, and ripeness-that govern the timing of federal court decisionmaking"). Because a prisoner may not bring such an action until available administrative remedies have been exhausted, the failure to prove or plead such exhaustion is a failure to state a valid claim. See Alexandroai v. California Dep't of Corrections, 985 F. Supp. 968, 970 (S.D. Cal. 1997); Barry v. Ratelle, 985 F. Supp. 1235, 1236 (S.D. Cal. 1997).

II. Defendants' Motion Construed As A Motion For Summary Judgment Is Denied

Before addressing defendants' motion on the merits, the court finds it necessary to determine the nature of the relief sought by Rumbles, and whether such relief can be obtained from a federal court. Rumbles seeks as relief (1) damages, (2) a formal apology from defendant Hill and

other unspecified staff at the Tehachapi institution, and (3) a federal investigation into unspecified state laws that "are stiffer on repeat offenders and [their] effect on the conduct of Correctional officers." The court finds that the doctrine of federalism prohibits the court from undertaking its own investigation into how state laws might be affecting correctional officers. See, Union County Jail Inmates v. DiBuono, 713 F.2d 984, 1001 (3rd Cir. 1982) (Eighth Amendment does not give federal courts "a roving commission" to impose upon states its "own notions of enlightened policy"). The court further finds that it is outside the power of the court to compel a party to apologize to another party. Therefore the only legally or equitable recognizable remedy that Rumbles seeks in this action is his claim for damages. The court will analyze this action as one seeking "only damages."

Defendants offer extrinsic evidence to prove that Rumbles did not file an administrative appeal with the CDC regarding the claims in this action, and that he did not present his damages claim to the state Board of Control. The court finds that defendants have not meet their initial burden pursuant to Rule 56 because such a showing does not entitle them to judgment as a matter of law.

The Ninth Circuit recently held that where a prisoner files a Bivens action seeking "only damages" against federal actors, that prisoner is "not required to exhaust his administrative remedies before filing this lawsuit in the district court in light of the fact that the [federal prison administrative grievance program] only provides for injunctive relief." Lunsford v. Jumao-As, 139 F.3d 1233 (9th Cir. 1998). For this proposition, the Ninth Circuit cited to section 1997e(a), thus signaling that it was interpreting that statute, and to Honig v. Doe, 484 U.S. 305, 327 (1988). Honig discussed exhaustion in the context of claims brought pursuant to the Education of the

Handicapped Act, and noted that the party seeking relief under that Act "may bypass the administrative process where exhaustion would be futile or inadequate." Id.

Prior to the enactment of the PLRA, a district court did not have the discretion under the former section 1997e(a)(1) to order federal prisoners exhaust their claims under the federal prison administrative process. However the amended section 1997e(a) now requires that both federal and state prisoners exhaust such remedies as are available. Lunsford is binding authority that a federal prisoner seeking "only damages" need not exhaust that claim before the federal prison grievance procedure since that procedure does not allow for the issuance of monetary relief. Because section 1997e(a) makes no distinction between federal and state prisoners, the court finds that Lunsford is equally applicable to state prisoners with "only damages" claims where the state prison administrative grievance system does not provide for monetary relief. Because the CDC appeal process does not provide for monetary relief, except for claims of $100 or less from lost or damaged personal property, Cal. Code. Reg., tit. 15, §§ 3084.1 - 3084.7, 3084.7(e), Rumbles "was not required to exhaust all his administrative remedies" provided by the CDC. Lunsford, 139 F.3d at 1233.

Unlike the CDC administrative remedy system, however, no binding authority exists to advise the court as to whether a prisoner seeking damages must present his claim to the state Board of Control prior to filing a court action for damages.

Under the California Torts Claims Act ("CTCA"), Cal. Gov't Code §§ 810 et seq., a damages action may not be maintained against a state agency or against state actors unless the claim is first timely presented to the state Board of Control. Cal. Gov't Code §§ 910-913.2, 945.4,

950.2. The California State Legislature created the CTCA in response to Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211 (Cal. 1961), which had abrogated common law governmental immunity from tort liability. Donovan v. Reinbold, 433 F.2d 738, 741 (9th Cir. 1970). The CTCA "abolished all court declared and common law based forms of tort liability of public entities in the state, with some exceptions, and substituted therefor a statutory system of liability and immunity, together with a procedural scheme to enforce the system." Id. Integral to this "procedural scheme" is the presentation of the damages claim within a specified time period. Id.

Prior to the enactment of the PLRA, the Ninth Circuit held that a defendant in a federal civil rights prisoner action could not raise the prisoner's failure to comply with the CTCA as a defense. New v. California, 439 F.2d 1285, 1287 (9th Cir. 1971) (citing Donovan, 433 F.2d 741-742). The holding was correct given that the Supreme Court later held that the Supremacy Clause and general principles of federalism preempted application of state "notice-of-claim statutes" to federal civil rights causes of action, and specifically to 42 U.S.C. § 1983. Felder v. Casey , 487 U.S. 131, 150-153 (1988).

Felder noted that "Congress never intended that those injured by governmental wrongdoers could be required, as a condition of recovery, to submit their claims to the government responsible for their injuries." Id. At 141. While this was undisputedly the law prior the enactment of the PLRA, defendants maintain that Congress has now expressly stated that prisoners must in fact present their claims to the state Board of Control because the CTCA is an administrative remedy which is available.

Defendants contend that when a prisoner files a written grievance with the prison that seeks financial

compensation over $100, the prisoner is notified that he or she may pursue that complaint with the state Board of Control. Cal. Code. Reg., tit. 15, §§ 3084.7(e)(4)(B). Certainly a California state prisoner can file a damages claim against the CDC with the state Board of Control, and therefore such a remedy is available to a prisoner. The question remains as to whether Congress intended to include state tort claim presentation procedures, such as the CTCA, within the meaning of "administrative remedy" as that phrase is used in section 1997e(a).

This court is aware of two published cases have addressed this issue, and both concluded that the CTCA claims presentation procedures are not "administrative remedies" within the meaning of section 1997e(a). Lacey v. C.S.P. Solano Medical Staff, 990 F. Supp. 1199, 1206-07 (E.D. Cal. 1997); Barry v. Ratelle, 985 F. Supp. 1235, 1238 (S.D. Cal. 1997).

The prior version of section 1997e(a)(1) gave district courts discretion under certain limited circumstances to stay a prisoner's federal civil rights claim for the purposes of requiring exhaustion of "administrative remedies." The prior section 1997e(a)(2) set forth the limited circumstances: the Attorney General had to certify, or the court had to determine, that the "administrative remedies" referred to in the former section 1997e(a)(1) met certain standards set forth in former section 1997e(b) or were otherwise fair and effective. Even a cursory reading of the former section 1997e(b) shows that Congress intended that the phrase "administrative remedies" within the former section 1997e(a)(1) to mean prison or jail grievance procedures. In addition to the plain wording of the former statute, no published decision of any court ever interpreted the phrase "administrative remedies" in former section 1997e(a)(1) to include state tort claims presentation procedures.

In amending section 1997e(a) Congress elected to continue to use the phrase "administrative remedies" within that subsection. When Congress amends a law, and includes sections of the prior law, "Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law." Lorillard v. Pons, 434 U.S. 575, 581 (1978). This court should therefore assume that Congress intended that the phrase "administrative remedies" in the amended version of section 1997e(a) would be given the same meaning that the exact phrase had in the prior form of that section.

Defendants do not point to any contrary legislative intent indicating that Congress intended to change the meaning of the phrase "administrative remedies" when it enacted the PLRA. To the contrary, Senator Kyl, one of the co-sponsors of the PLRA, made a statement on May 25, 1995 which in part included the following language, indicating that "administrative remedies" meant prison grievance systems:

> Mr. President, I join Senator Dole in introducing the Prison Litigation Reform Act of 1995. This bill will deter frivolous inmate lawsuits.
> ...
> Section 7 will make the exhaustion of administrative remedies mandatory. Many prisoner cases seek relief for matters that are relatively minor and for which the prison grievance system would provide an adequate remedy.

141 Cong. Rec. S7526-7527.

For the above reasons the court concludes that the tort claims presentation procedures mandated by the CTCA are not an "administrative remedy" within the meaning of section 1997e(a). Rumbles therefore need not

plead compliance with the CTCA to meet the exhaustion requirement.

CONCLUSION

Defendants' motion to dismiss, properly analyzed under Fed. R. Civ. P. 56 due to defendants' reliance on extrinsic evidence, must be denied. The court is bound by the statutory construction of 42 U.S.C. § 1997e(a) recently announced by the Ninth Circuit in Lunsford v. Jumao-As that prisoners seeking "only damages" need not exhaust administrative remedies with prison grievance systems that do not provide for an award of monetary damages.

Additionally 42 U.S.C. § 1997a(e) does not require Rumbles to present his damages claim to the State Board of Control prior to filing this action. The "failure" to file an action with the State Board of Control prior to filing this action is not a bar, jurisdictional or otherwise, to this federal action.

ORDER

For the reasons stated in the above Memorandum Opinion, IT IS HEREBY ORDERED that

1. Rumbles' requests for a federal investigation into the effect of state laws on corrections officers, and for an order requiring defendant Hill and unspecified persons to apologize, are DISMISSED;

2. the moving defendants' motion to dismiss, construed as a motion for summary judgment based on the failure to exhaust, is DENIED;

3. the moving defendants shall file their answers within twenty-one days of the filing of this

Memorandum Opinion and Order, plus an additional three days as provided by Fed. R. Civ. P. 6(e); and

4. all parties are ordered to include the correct case number CV F 97 5533 AWI SMS P, on all future filings.

DATED: June 19, 1998

/s/ Anthony W. Ishii
ANTHONY W. ISHII
UNITED STATES DISTRICT JUDGE

MacArthur Rumbles #E10187
Full Name

California Correctional Institution
Committed Name (if different)

P.O. BOX 680 STATE PRISON
Full Address Including Name of Institution

Tehachapi, CA 93581

#E-10187
Prison number (if applicable)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MacArthur Rumbles

Plaintiff,

vs.

D.R. Hill, Warden

T. Meadors, Correctional Lieutenant

K. Black, Correctional Officer

J. Beckett, Correctional Officer

Defendant(s).

Case No. CV 96-8602
(To be supplied by the Clerk)

CIVIL RIGHTS COMPLAINT PURSUANT TO (check one)

/x/ 42 U.S.C. §1983

or

/ / Bivens v. Six Unknown Agents

403 U.S. 388 (1971);
28 U.S.C. §1331

A. JURISDICTION

This Complaint alleges that the civil rights of plaintiff, MacArthur Rumbles
(print Plaintiff's name)
who presently resides at California Correctional Inst., P.O. Box 608, Tehachapi, CA 93581-4308 were
(mailing address or place of confinement)
violated by the actions of the below-named individuals, which actions were directed against plaintiff at California Correctional Institution, Tehachapi, CA
(institution/city where violation occurred)
on (dates) 10/05/96. 10/19/96. 11/11/96.
(Count 1) (Count II) (Count III)

(You need not name more than one defendant; however, make a copy of this page to provide the information below if you are naming more than five (5) defendants.)

1) Defendant D.R. HILL resides or works at
(full name of first defendant)
P.O. Box 608, Tehachapi, CA 93581,
(full address of first defendant)
and is employed as Warden.
(defendant's position and title, if any)
This defendant is sued
In his/her: ___individual X official capacity. (Check one or both).
Explain how this defendant was acting under color of law:
D.R. HILL is employed by the State of California as "Warden" and is responsible for the governing policies of California Correctional Inst.

2) Defendant T. Meadors resides or works at
(full name of Second defendant)
(Same as Above), and is employed as
(full address of Second defendant)
Correctional Lieutenant.
(defendant's position and title, if any)
This defendant is sued in his/her:
_individual X official capacity. (Check one or both).
Explain how this defendant was acting under color of law:
As a state-employed Correctional Lieutenant, T. Meadors, acted as supervisor of C/O Black and served as Senior Hearing Officer.

3) Defendant K. Black resides or works at
(full name of Third defendant)
(Same as Above), and is employed as
(full address of Third defendant)
Correctional Officer.
(defendant's position and title, if any)
In his/her: _individual X official capacity.
(Check one or both).
Explain how this defendant was acting under color of law:
C/O Black, violated my civil rights and assualted my person while acting as a state-employed Correctional Officer.

4) Defendant J. Beckett resides or works at
(full name of Fourth defendant)
(Same as Above), and is employed as
(full address of Fourth defendant)
Correctional Officer.
(defendant's position and title, if any)
This defendant is sued in his/her:
_ individual _X_official capacity.
(Check one or both).

Explain how this defendant was acting under color of law:
While serving as a Correctional Officer and as my official Investigative Employee, C/O Beckett, misrepresented my defense in order to protect his fellow employee - C/O Black.

5) Defendant _____ resides or works at
(full name of Fifth defendant)
_____, and is employed as
(full address of Fifth defendant)
_____. This defendant is sued
(defendant's position and title, if any)
Explain how this defendant was acting under color of law:

_____

6) Jurisdiction is invoked pursuant to:

/x/ 28 U.S.C. § 1343(a)(3) and 42 U.S.C. § 1983;

or

/ / Bivens v. Six Unknown Agents, 403 U.S. 388 (1971); 28 U.S.C. § 1331.
If you wish to assert jurisdiction under different or additional statutes, list them below.

_____

_____

B. NATURE OF THE CASE

1) Briefly state the background of your case.

I've suffered from a frivilous inmate disciplinary action which has tramatically affected my PTSD (Post Tramatic Stress Disorder) condition; and caused me to suffer nerve and urinary problems. These, as well as self-esteem problems, were brought about by the vindictive, unprofessional conduct of C/O Black.

C. CAUSE OF ACTION
COUNT I

The following civil right has been violated:

UNEQUAL TREATMENT

Supporting Facts: [Include all facts you consider important. State the facts clearly, in your own words, and without citing legal authority or argument. Be certain you describe, in separately numbered paragraphs, exactly what each defendant (by name) did to violate your right].

I was treated differently than other inmates in that C/O Black was permitted by her supervisor, Lieutenant T. Meadors, to spit in my face, threaten me, and call me derogatory names (such as nigger, dick-head, etc....).

COUNT II

The following civil right has been violated:

Cruel and Unusual Punishment/Abuse

Supporting Facts: [Include all facts you consider important. State the facts clearly, in your own words, and without citing legal authority or argument. Be certain you describe, in separately numbered paragraphs, exactly what each defendant (by name) did to violate your right].

It's very difficult (and embarrassing) to convey the extent of my suffering and damage resulting from C/O Black's unprofessional misconduct. On, or about, 10/05/96, in an effort to ask officer Black a question, I over-hear her speaking to other inmates. She was calling them "Dick-Heads". She said it several times when I spoke up and said "you're not suppose to use names like that when you speak to inmates". My comment obviously upsetted her and she responded by telling me, "Listen asshole, you don't tell me what I can and can't do. In here I'm God, and don't forget it. Now get the hell out of here!" Then, on or about 10/19/96 (9 days later) I found an anonymous note in my locker making deragotory statements about another C/O. This, I felt was a serious matter since I've seen inmates disciplined for this type of speaking before. I confrounted C/O Black (suspecting this to be a retaliatory act due to our

previous encounter). This time she escalated the situation by telling me. "If I wanted to set you up, I can think of a lot better ways to do. But, I've had just about enough of your nigger ass. I'm gonna crucify you, you black son-of-a-bitch. Get the fuck out of here!" While saying these things to me, she was poking her finger in my check and pushing me at the shoulder. Later, she returned and told me to turn around. She placed handcuffs on me. She then took me into

(Continued on Page #41a)

COUNT III

The following civil right has been violated:

Due Process/Unprofessional Actions of Officers

Supporting Facts: [Include all facts you consider important. State the facts clearly, in your own words, and without citing legal authority or argument. Be certain you describe, in separately numbered paragraphs, exactly what each defendant (by name) did to violate your right].

On or about 11/04/96 I was approached by C/O Beckett. I was told he would be acting as my Investigative Employee. After explaining myself to him and giving him a list of names of possible witnesses, he concluded our meeting. I had no other contact with him until 11/11/96, when I recieved a copy of his report from the Senior Hearing Officer (Lt. T. Meadors) at my disciplinary hearing.

In both the investigative report and the hearing report my comments were grossly misrepresented and shortened. Several comments I made in my defense were not noted or ignord. There was an overwhelming posture that nothing would be done about C/O Black's conduct. They simply didn't want to hear about it. Hearings are supposed to be fair and impartial, this simply was not the case. I was found guilty long before I entered Lt. T. Meadors office.

I asked him if he condones the actions of C/O Black. His answer was, in essence, "whatever gets the job done". I have been convinced that this is the overall policy of D.R. Hill, the warden of this institution.

D. PREVIOUS LAWSUITS AND ADMINISTRATIVE RELIEF

1) Have you begun any other lawsuit(s) in any state or federal courts dealing with the same or similar facts involved in this action? __Yes _X_ No. If your answer is "YES", describe each lawsuit. (If more than one, describe the others on an additional page following this outline.)

a) Parties to previous lawsuit:
Plaintiff(s):_____

Defendant(s):_____

b) Name of Court and Docket No.: _____
_____

c) Disposition (for example, was the case dismissed, appealed or still pending?): _____
_____

d) Issues raised: _____
_____

e) Approximate date it was filed: _____
_____

f) Approximate date of disposition: _____
_____

2) I have previously sought informal or formal relief from the proper administrative officials regarding the acts alleged in Part C. X YES ___ NO. If your answer is "YES", briefly describe how relief was sought and the results. If your answer is "NO", briefly explain why administrative relief was not sought.

The proper method for seeking relief within the California Penal system is to fill out CDC Form #602 explaining your appeals. I have filed two (2) CDC Form #602s and have not recieved any response whatsoever from prison administrators. I fear that my appeals have been intentionally misplaced or destroyed.

E. REQUEST FOR RELIEF

I believe that I am entitled to the following specific relief:

I'm requesting a federal investigation of the treatment of inmates in light of new California Laws that are stiffer against repeat offenders and its effect on the conduct of Correctional Officers. 2.) I'm requesting punitive damages in the amount of $450,000.00, due to the psychological and physical damages caused to my person. 3.) I'm requesting a formal apology from the warden and staff of the California Correctional Institution.

_____ /s/ Macarthur Rumbles
(Name of person who wrote this Complaint if not plaintiff) (Signature of Plaintiff)

11/30/96
(Date)

(Additional space if needed; identify what paragraph is being continued).

her office and told me "I told you I was gonna get your nigger ass. Now I'm gonna throw your ass into 4B Jail (a high security area). We run this place." Then she spit in my face, wiped it away, and escorted me to the sergeant's office. As a Vietnam Veteran, with a history of PTSD (Post Tramatic Stress Disorder), the constant sight of officers with guns - in high towers - devastated the progress made in my recovery. I suffered from nightmares of her (and other officers) entering my cell in the night to beat me. I also developed a serious case of uncontrollable (nerve) shaking. Her constant use of "nigger ass" this and "nigger ass" that, has produced a serious bout with depression and fear, and feeling of helplessness (black male under the wrath of a white female officer).